2001

State of Utah v. Stewart Michael Kelsey : Brief of Respondent

Utah Supreme Court

BRIEF

IN THE

SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff-Respondent,
vs.
STEWART MICHAEL KELSEY,
Defendant-Appellant.

Case No. 13376

BRIEF OF RESPONDENT

Appeal from a Judgment of the District Court of The Third Judicial District, in and for Salt Lake County, State of Utah, the Honorable D. Frank Wilkins, Presiding.

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STATEMENT OF THE NATURE OF THE CASE

This is an appeal brought by the appellant Stewart Michael Kelsey of a conviction of second degree murder.

DISPOSITION IN THE LOWER COURT

The appellant Stewart Michael Kelsey was charged with murder in the first degree after the death of one Raymond Douglas Eagle. The Honorable Ernest F. Baldwin found the appellant sane and competent to understand the nature of the processes against him and to aid in his own defense. The Honorable D. Frank Wilkins

of the Third Judicial District sat without jury at the trial of the appellant and on April 18, 1973, found the appellant guilty of murder in the second degree. The appellant was sentenced to an indeterminate term of from ten years to life in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

The respondent seeks the affirmation of the trial court's finding that the appellant was guilty of murder in the second degree and an order refusing the appellant's request for a new trial.

STATEMENT OF FACTS

The respondent agrees basically with the facts presented in appellant's brief but adds the following to clarify and add to what has been presented.

(1) Mrs. Betty Herron testified that even though the police officers did not have a search warrant to look in the house, they asked her if they could do so (R. 187). Further, she stated that she wanted to be a law abiding citizen and therefore allowed them in even though she knew she could refuse to admit them (R. 187). At no time did she or anyone ask them to leave.

The money paid Mrs. Herron by the appellant was for a pre-existing debt from a previous residence. The amount over and above the cost of the phone was $4 (R. 418).

(2) Dr. Dominic Albo, who performed surgery on Raymond Eagle testified that the laceration of the liver

came from a blunt trauma (R. 222) and required considerable force for the liver to be injured in that manner (R. 228).

(3) Officer Jerry Campbell of the Salt Lake Police Department spoke with the defendant for the first time at approximately 10:35 p.m. on the evening of November 27, 1972 (R. 263). At that time, no Miranda warning was given because it was not known the involvement and acts of the defendant (R. 263-266). After approximately 30 minutes, the Miranda warning was given and a reporter took down his statement (R. 268). Nothing from the conversation between Officer Campbell and the defendant which took place between 10:30 and 11:00 p.m. was admitted into evidence at trial (R. 263-264). While enroute to the defendant's quarters, the defendant was once again told his rights (R. 270). The defendant helped locate items used in the beating and told the officer about the belt (R. 273).

(4) Stewart Michael Kelsey, defendant in the case, admitted that his rights were given him three times that evening (R. 289) and that he knew at that time that anything he said would be used against him (R. 29). When asked whether he understood the rights he said yes (R. 293) and though he subsequently testified that he wanted an attorney, he in fact never requested one (R. 291).

(5) Richard Shepard, Deputy County Attorney, testified that the defendant carried on a logical reasonable conversation with him (R. 307).

(6) Doctor Moench testified that the defendant had a disorder whereby he had to gratify impulses (R. 452) and that his ability, to control such was diminished (R. 452). The defendant was emotionally keyed up from an altercation with his stepfather which took place on a previous day (R. 454). He further testified that there was probably no intent to harm the child until after the event got underway (R. 455) and that the child's actions made the defendant lash out (R. 456). It was testified that the defendant knew right from wrong and knew the nature and consequences of his acts (R. 458), that it's not right to strike or make an injured child walk and to do so could kill the child (R. 458-459). The defendant was in the "normal" intelligence range (R. 465).

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN ALLOWING THE APPELLANT TO WAIVE TRIAL BY JURY IN THE CASE AT BAR.

A.

IT WAS UNDERSTOOD BY BOTH COUNSEL AND THE COURT THAT THE DEATH PENALTY WOULD NOT BE IMPOSED IN THE CASE MAKING THE WAIVER OF A JURY TRIAL PERMISSIBLE.

The appellant relies upon Utah Code Ann. § 77-27-2 (1953), as the basis for this appeal. The pertinent language of the statute is as follows:

> "Issues of fact must be tried by a jury, *but in all cases except where a sentence of death may be imposed, trial by jury may be waived by the defendant.* Such waiver shall be made in open court and entered in the minutes." (Emphasis added.)

A cursory reading of this language makes it appear that in *every* capital case, a trial by jury is an absolute which cannot be waived. This position is propounded at great length by the appellant in Argument I of his brief. The respondent contends, however, that the standard so claimed is not "absolute," but hinges solely on the determination whether the death penalty "may be imposed."

The appellant argues strenuously that a judge must impose a penalty of death in a first degree murder case *once* the verdict of guilty is brought in and that only the jury can request otherwise. This analysis has little or no bearing on the case at bar since appellant was found guilty of second degree murder rather than first degree and since the prior ruling of the court allowing Kelsey to waive a jury (thereby impplying that no death penalty would be imposed) mitigated any possibility of prejudice to the defendant.

State v. *Markham,* 100 Utah 226, 112 P. 2d 495 (1941), is cited by the appellant to indicate the differ-

ence between the jury's function and that of the court. It is an accepted standard, however, that the court decides points of law and not the jury. Thus, since the United States Supreme Court decided *Furman* v. *Georgia*, 408 U. S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), the status of Utah's death penalty has been in question. No express answer has yet been given as to its status in Utah. The respondent claims, however, that the totality of the *Furman* case need not be examined in the case at bar. What needs to be examined is the death penalty's status as it relates to the present situation.

In the case of *State of Utah* v. *Christean and Rogers*, No. 13510, Utah Supreme Court case pending before this Court and whose trial took place several weeks before the present case, Mr. Gilbert Athay was appointed as counsel in that case and trial was held in the Third Judicial District Court, the Honorable Ernest F. Baldwin, presiding. In the opening moments of that trial the court ruled as follows:

> "THE COURT: Pursuant to the statute quoted by Mr. Athay the statute requires in this case that issues of fact must be tried by a jury, but in all cases, except where a sentence of death may be imposed, trial by jury may be waived by the defendant. . . . [the Supreme Court has said that statutes like ours, and I indulge, are not constitutional at this time. *Therefore, I would have to hold that in no event in this case could the sentence of death be imposed.* Therefore, you would have the

> right, according to our statute, to waive a jury trial. What is your desire? Do you desire to waive your constitutional right?]" (Emphasis added) (T.7)

Whether Judge Baldwin misconstrued the *Furman* case as it applies to Utah law is not paramount. What is important is the fact that Mr. Hill, a legal associate of Mr. Athay, relied on Judge Baldwin's ruling as did the Honorable D. Frank Wilkins. This understanding of the court and counsel, though not made in open court as was done in the *Christean* case is what all parties relied on in the granting of the appellant's motion to waive the jury trial. As such, the findings of law before the trial commenced confirmed in the mind of counsel and the court that the death penalty would not be invoked and that a ruling became the "law of the case." See *Straka* v. *Voyles*, 69 Utah 123, 257 P. 677 (1929), which discusses the concept of "law of the case." No exception was taken at the time of trial, and there is nothing to show that the court or counsel moved for such waiver in reckless disregard for what the outcome would be. Mr. Hill and Judge Wilkins were fully aware of the language of Utah Code Ann. § 77-27-2. Mr. Hill's knowledge was particularly indicated by his discussion with Mr. Kelsey wherein they viewed the meaning of a jury trial and its waiver.

There is no way that the appellant can claim he was prejudiced by such an understanding between the court and counsel. If anything, prejudice was against

the state. The "law of the case" was that the death penalty would not be applied even if the court found murder in the first degree. Furthermore, there was no prejudice in fact, since the court found the appellant guilty of a lesser crime — murder in the second degree which does not carry the penalty of death.

Appellant cites *State* v. *James*, 30 Utah 2d 32, 512 P. 2d 1031 (1973), and *Roll* v. *Larsen*, 30 Utah 2d 271, 516 P. 2d 1392 (1973), in support of his position that a jury trial cannot be waived. Neither case is on point. A careful reading of *James* and *Roll* indicates that the court merely held that "capital" cases still exist in Utah. The entire opinions center around discussions of "classification" theory of offenses and how that theory stands in light of *Furman*. Respondent concedes and agrees with the court's opinions in *James* and *Roll* that certain offenses are still capital in nature. The court said in *James*:

> "The Constitution of the State has provided a system of classifying certain serious offenses as capital cases and then mandated a specific procedural structure for the administration of justice based on that classification. *Furman v. Georgia* cannot be rationally construed as abrogating our fundamental law."

The procedural structure referred to is that defendants may waive a jury trial in all cases except where the death penalty may be applied. Therefore, in capital

cases where a death penalty may be a reality, one must be tried by a jury of twelve. In the present case, however, it was the "law of the case" that the death penalty could not be imposed, thus allowing a waiver of jury trial, which means a waiver of the twelve man jury as prescribed by *James*. Thus, it must be concluded that capital offenses still exist, but that the waiver of the jury trial in the instant case was and is not governed by the *James* and *Roll* cases as asserted by the appellant.

The respondent therefore submits that no prejudice exists which would demand the reversal for a new trial. The understanding of all parties involved made the possibility of the death penalty a nullity and therefore the trial court's findings should be sustained.

B.

JURY TRIAL IS WAIVABLE BY DEFENDANTS IN CAPITAL CASES AND UTAH CONSTITUTIONAL AND STATUTORY LANGUAGE IS NO BAR THERETO.

Though a first reading of Utah constitutional and statutory provisions appears to indicate otherwise, there is strong reason to allow waiver of jury trials in those cases raised by the appellant. Absolute standards can be detrimental to those whom they are designed to protect. Flexibility must exist to prevent undue prejudice if the defendants in particular instances feel such would take place.

"Supposed fairness" is the argument used to establish the sanctity of a jury trial — especially in capital cases. This philosophy of fairness is deeply rooted in the common law. Such background led to Utah's enactment of Utah Code Ann. § 77-27-2 on which appellant's arguments are based. Basically, this protection was used to protect individuals from the tyrannny of the state. Today's "Due Process" procedures make available to an accused the protections upon which the jury trial system was based. The standards now insure that protections will be afforded and followed —the courts being the determiner of their effectiveness. The language emphasized by the appellant, is merely a verbal expression pointing out the importance of keeping the right to jury trial a reality. This simply means that such a right cannot be destroyed or ignored and that such a right shall always exist.

Article I, Section 10 of the Utah Constitution says: "In capital cases, the right of trial by jury shall remain *inviolate*." (Emphasis added.) "Inviolate" has been defined in jurisdictions such as Washington, *State* v. *Furth*, 5 Wash. 2d 1, 104 P. 2d 925 (1940), to mean that the right cannot be "impaired" or "abridged" in any way, but must always exist. Utah Code Ann. § 77-27-2 takes this language and attempts to make the standard absolute. In other words, the statute attempts to make jury trials absolute in certain instances even though the constitution does not go that far. The propriety of attempting to expand the constitutional language without con-

stitutional amendment is clearly questionable. The constitution merely provides that the *right* is absolute, but does not state that the application of that right is absolute or that the right can never be waived.

Respondent contends that many circumstances can arise where an accused charged with murder in the first degree would desire to waive a jury trial. The article "waiver of Trial by Jury in Criminal Cases," 25 Mich. Law Review 695 (1927), lists what could be considered a few of the reasons. The list contains the following:

1) The charge is of a revolting nature.
2) The entire state or community is aroused.
3) The past record of the accused is bad.
4) Public sentiment might influence jury.
5) Great deal of publicity before trial.
6) It is a prosecution involving race.
7) Judges greater experience can be valuable to the accused.
8) Feeling that the jury will convict on general principles instead of evidence.
9) Confidence in fairer trial by judiciary.
10) Reluctance to go to trial on complicated issues.
11) A desire to avoid the cumbersomeness and delay of a jury trial.

Certainly, these eleven reasons are not all inclusive, but they show that an absolute standard could work as a detriment in specific instances. It is obvious that in many cases it may be advantageous to have a trial by a judge without a jury — to deny such a choice might in itself deny the accused the right to a fair trial and make the jury an instrument of oppression rather than a means of "fair protection."

The Ohio Supreme Court held many years ago in *Hoffman* v. *State*, 98 Ohio St. 137, 120 N. E. 234 (1918), that:

> "Clearly this right [of jury trial] is for the benefit of the accused. If he regards it in the particular case as a burden, a hardship, a prejudice to fair trial, why in the name of reason should he not be permitted to waive it and submit his case to the magistrate. . . . What was given to him generally as a shield should not be used as a sword in case he feels that a jury trial in such a case would so result."

The Utah Supreme Court recognizes that circumstances exist in which a jury trial may be waived without even trying the case to establish the facts. The court has openly acknowledged through its decisions that the plea of guilty, made in open court, takes the place of trial and verdict. Thus, if an accused in a first degree murder case enters a plea of guilty it is clear that he effectively waives jury trial even though the offense may be punishable by death.

In *State* v. *Stewart*, 110 Utah 203, 171 P. 2d 383 (1946), the Utah Supreme Court established that a plea of guilty dispenses with the jury because the plea is the same as if a jury had found the accused guilty. The court said:

> "He contends that the evidence shows that he pleaded guilty as a matter of convenience, and that a plea of guilty does not amount to a conviction. Such novel argument is specious. Unless timely withdrawan, a plea of guilty places a defendant in the same position as a verdict of a jury finding him guilty of the charge after a fair and impartial trial. A plea of guilty is a confession of the correctness of the accusation which dispenses with the necessity of proof thereof."

This holding was recently upheld in *Coombs* v. *Turner*, 25 Utah 2d 397, 483 P. 2d 437 (1971), when the court said:

> "A plea of guilty dispenses with the necessity of proof, and the issue of innocence or guilt cannot here be relitigated any more than it could be after a jury verdict of guilty."

Patton v. *United States*, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1930), involved the interpretation of Art. III, Section 2, para. 3 of the United States Constitution requiring jury trial in *all* criminal cases. In rejecting this absolute standard and language the Court stated:

> "In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused. . . .
>
> Upon this view of the constitution provisions we conclude that article 3, § 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement. . . .
>
> After an extensive review of the authorities and a discussion of the question on principle, the court concluded that, since it was permissible for an accused person to plead guilty and thus waive *any* trial, he must necessarily be able to waive a *jury* trial."

See also, *Mason* v. *United States*, 250 F. 2d 704 (10th Cir. 1957).

In light of the foregoing authority, it seems unreasonable to permit an accused to dispense with every stage of trial by a plea of guilty, and yet forbid him to dispense with a particular form of trial (trial by jury) by consent or waiver. These inconsistencies must give way to the better reasoned rule that the right to trial by jury — even in light of the statutory language of Utah Code Ann. § 77-27-2 is not absolute but must depend on circumstances in each particular case. Such a waiver is not contrary to sound conceptions of fairness or public

policy. If, for instance, the court holds that the death penalty will not apply in a particular case, then it is not error for the accused to waive the jury.

The law permits venue to insure a fair trial, or to allow the accused the best position. Why then, if an individual honestly feels he would be judged more fairly by a judge sitting without a jury, should we force him to have his case heard by a jury? This type of force runs counter to Utah's as well as the United States' conception of justice.

New York had no difficulty in realizing that this force should not be used. Article I, Section 2 of the New York Constitution is as explicit as Utah's statute and yet, the court allowed waiver. The pertinent language of the New York Constitution is as follows:

> "Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever * * *. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense."

This constitutional provision was interpreted by the New York Court in *People* v. *Duchin*, 12 N. Y. 2d 351, 190 N. E. 2d 17 (1963), where an individual charged with rape in the first degree, assault in the second degree,

carnal abuse of a child . . ., waived jury trial and later challenged that waiver on appeal. The court held that the jury trial may be waived in all cases despite the language of the constitution. The majority held that if an intelligent and knowing waiver is made, the jury may be waived. The court said:

> "The provision is designed for the benefit of the defendant. When, choosing to be tried by a judge alone, he requests a waiver, he is entitled to it as a matter of right once it appears to the satisfaction of the judge of the court having jurisdiction that, first, the waiver is tendered in good faith and is not a stratagem to procure an otherwise impermissible procedural advantage— . . . —and, second, that the defendant is fully aware of the consequences of the choice he is making."

Further, Article 12 of the Massachusetts Constitution contains the following language regarding jury trials:

> "And the legislature shall not make any law that shall subject any person to a capital or infamous punishment. . . . without trial by jury."

In interpreting this language, the Massachusetts Court held in *Commonwealth* v. *Rowe*, 153 N. E. 537 (Mass., 1926), that:

> "We find nothing in the words of our Constitution which declares or manifests an

> intention to deprive the individual of power to refuse to assert his constitutional right to trial by jury."

Thus, it can be clearly seen that there is support to the proposition that an individual can waive jury trial in capital offenses such as the one at bar.

It is further established that nearly all rights granted by the United States Constitution may be waived. The only ones which appear to conflict with such a statement are "due process" or "equal protection" rights which themselves are made up of other waivable rights — such as trial by jury.

The United States Supreme Court has accepted this philosophy and subsequently established it by holding that "knowing and intelligent waiver of constitutional guarantees is only needed for those guarantees affecting due process." *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 93 S. Ct. 2041, 361 F. 2d 854 (1973). The court recognizes that it is wrong to force rights upon an individual if he does not want their protection. Rights are afforded individuals to insure protections. If such protections are not wanted, not needed, or possible detriments to an accused, he should have the unalterable right to say "I don't want that right."

The following are some of the rights which have been held to be waivable. (1) Right to a jury trial in criminal cases. *Patton* v. *United States*, 281 U. S. 276, 50 S. Ct. 253 (1930). (2) Right against self-incrimination. *Schmerber* v. *State of California*, 384 U. S. 757, 86 S. Ct. 1826,

16 L. Ed. 2d 908 (1966). (3) Right to confront witnesses. *Illinois* v. *Allen*, 397 U. S. 337, 90 S. Ct. 1057, 25 L. Ed. 353 (1970). (4) Right to a speedy trial. *Barker* v. *Mingo*, 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). (5) Right to counsel. *Argersinger* v. *Hamlin*, 407 U. S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). (6) Search and Seizure protections. *Katz* v. *United States*, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). (7) Grand Jury indictment. *Smith* v. *United States*, 360 U. S. 1, 79 S. Ct. 991, 31 L. Ed. 2d 1041 (1959).

These few cases are, of course, only a representative sample of the many waivable rights. An individual of normal competence and intelligence should have some power over determining his future. He had that right when the crimes were committed. He should also have that right in relation to the consequences thereto.

It is therefore submitted that public policy supports the view that an accused should be permitted to waive his right to jury trial.

POINT II.

APPELLANT SHOULD NOT BE PERMITTED TO CLAIM REVERSIBLE ERROR (IF ERROR THERE WAS) SINCE SUCH ERROR WAS INDUCED BY THE APPELLANT AND WAS NOT PREJUDICIAL.

Utah, along with numerous other jurisdictions, limits the rights of appellants in what can and cannot be ap-

pealable errors. Such situations come into existence where defendants pled error to some facet of a trial where they induced the court into error or acquiesced to the decision made. This "after-the-fact" argument is exactly what appellant Kelsey is doing on this appeal. Simply stated, he is attempting to better his chances by claiming error to the ruling of the court which he asked the court to make. This "afterthought" approach claims "prejudice" when in fact no such prejudice existed.

Appellant was charged with murder in the first degree but was not found guilty of that offense. He was found guilty of murder in the second degree — a lesser offense — and received a lighter sentence than if he had been convicted of the capital offense. Appellant claims this is "prejudice." Respondent cannot understand how this conclusion is reached. It is not prejudicial for an accused to get a lighter sentence, when, as in this case, the evidence is arguably strong enough to convince a jury that premediated murder took place and that appellant was guilty of that greater offense. Respondent urges the court to recognize this non-prejudicial decision of the court not that claimed by appellant.

A leading case of the United States Supreme Court in this area, *Johnson* v. *United States*, 318 U. S. 18, 63 S. Ct. 549, 87 L. Ed. 704 (1943), held that the practice of claiming error on appeal from self-induced requests at trial cannot be sustained. The Court said:

> "We cannot permit an accused to elect to pursue one course at the trial and then, when

> that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal. The fact that the objection did not appear in the motion for new trial or in the arguments of error makes clear that the point now is a 'mere afterthought., "

If a party adheres to a particular mode of strategy in open court and either misleads or joints in any error induced by his strategy, and does not raise or claim such error at this time, he should not be permitted to complain of unfairness by repudiating the course of trial he originally called for. Justice is not a system made up of accepted standards where parties can go back on their word — if you lose, repudiate your motions, agreements, and acts — but one where procedures are established to allow the orderly objection and handling of errors which do take place. (See also *People* v. *Pijal*, 33 Cal. App. 2d 682, 109 Cal. Rptr. 230 (1973)).

Whether the cases have been criminal or civil, the Utah Supreme Court has been quick to uphold the position referred to above. In *State* v. *Aikers*, 87 Utah 507, 51 P. 2d 1052 (1935) the Court said:

> "We think the rule applicable that a party cannot successfully assign as error a ruling which he himself induced the court to make."

This position was reaffirmed in the brief opinion of the court in *State* v. *Fair,* 28 Utah 2d 242, 501 P. 2d 107 (1972), where the defendant' s counsel chose to examine a witness outside of the presence of the jury and claimed on appeal that it was prejudicial error for the judge to have granted such motion. The court made it clear that the error complained of was self-induced and that it would not be permitted to stand on appeal. The court said:

> "Counsel chose not to do so, whether as a matter of strategy or otherwise--and it does not lie in the mouth of defendant now to claim error having either wittingly or unwittingly invited it."

In the present situation, it is not totally clear why appellant Kelsey wanted a trial without a jury. Discussions pertaining thereto are off the record and are guarded by the attorney-client privilege. But, whether the appellant's separate counsel convinced him "wittingly or unwittingly" to move for such waiver is now of no concern. The fact is such motion was made, the judge was forced to rule, he did so, and the appellant accepted the ruling because it was what he desired. The appellant should not be allowed to now claim, as he looks back over his conviction, that prejudicial error of any magnitude took place.

The Utah Supreme Court has spoken on this issue on many other occasions. Many of them, however, concerned themselves with civil cases which do not have the same gravity of effect. The respondent submits, however, that the principles and law laid down in those cases apply just as well to the case at bar as to the situations under which the holdings were rendered. *Ludlow* v. *Colorado Animal By-Products Co.*, 104 Utah 221, 137 P. 2d 347 (1943), held:

> "A party who takes a position which either leads a court into error or by conduct approves the error committed by the court, cannot later take advantage of such error in procedure."

Later, in *Pettingill* v. *Perkins*, 2 Utah 2d 266, 272 P. 2d 185 (1954), the court expanded and reaffirmed what it had said many times before. The court said in part:

> "Furthermore, it is well established that a party cannot assign as error the giving of his own requests. He cannot lead the court into error and then be heard to complain thereof. . . ."

Decisions from other jurisdictions supporting respondent's position are voluminous. Some recent cases in support thereof are: *People* v. *Delgado*, 32 Cal. App. 3d 242, 108 Cal. Rptr. 399 (1973), holding that a party is estopped from asserting error on appeal that was induced by his own conduct. "He may not lead a judge

into *substantial* error and then complain of it." (Emphasis added.) *Mack* v. *United States*, 310 A. 2d 234 (D. C. App., 1973), holding that one cannot invite error and complain of prejudice; *People* v. *Shackelford*, 511 P. 2d 19 (Colo., 1973), holding that the party who was the instrument of injecting error must abide by the consequences of such errors; *People* v. *Miles*, 13 Ill. App. 3d 45, 300 N. E. 2d 822 (1972), which held that a defendant would not be permitted to argue an alleged error where his counsel of record actually invited and affirmatively participated in the procedure which he now claimed as error.

In the present case, Mr. Hill conversed with appellant in detail about waiving a jury trial and based on these out of court discussions, appellant determined that he wanted to waive trial by jury (R. 96). A motion was made shortly after the court was called to order. The court questioned the appellant as to his desire to waive jury trial and the transcript of the trial indicates that the appellant had an ample understanding of what was taking place. Appellant does not contend otherwise.

Simply because appellant Kelsey is represented by different counsel on appeal does not authorize appellant now to reject his own and his former counsel's actions and motions before the trial judge. Certainly, the record establishes that the appellant led the trial court into allowing the waiver of jury trial.

In light of the foregoing analysis and authority, as well as the clear implications and statements contained

in the record, it is respectfully submitted that the appellant Kelsey cannot now claim injury for something he himself led the court to do. This is especially significant in light of the fact that no prejudice took place since the entire history and record of this case contains no evidence of such. It is therefore submitted that on this ground alone, the contentions of the appellant should be rejected.

POINT III.

THE TRIAL COURT PROPERLY RULED DEFENDANT'S WAIVER WAS A VOLUNTARY AND KNOWING WAIVER OF HIS RIGHT TO REMAIN SILENT, AND TO HAVE COUNSEL PRESENT DURING POLICE QUESTIONING.

The issue presented by the appellant within Point III of his brief is whether the evidence sustains that he *knowing* and *voluntary* waived his rights to remain silent and to have counsel present during questioning.

Appellant's first challenge is premised upon *mistake* and the second upon capacity. Respondent will treat these arguments in that order.

The best evidence as to the voluntariness and knowingness of appellant's actions at the time of his confession is derived from an examination of the recorded confession (State's Exhibit 20).

The confession contains ample evidence of efforts

by the state to insure the defendant's understanding of his Fifth Amendment Rights, as prescribed in *Miranda* v. *Arizona, supra.*

(1) Page one (1) of the confession records the following exchange:

> Q. Stewart, you were advised of your rights before by Sgt. JOHNSON. We agin want to advise you of your rights.
> You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.
> Do you understand each of these rights I have explained to you?
>
> A. Yes.
>
> Q. Having these rights in mind, do you wish to talk to us now?
>
> A. Yes.
>
> Q. If you wish to answer our questions now without contacting a lawyer or without a lawyer present, you have the right to stop answering questions at any time. Do you understand each of these rights?
>
> A. Yes.

(2) On page seven (7) an effort was again made

to insure the *voluntary* and *knowing* nature of defendant's admission:

Q. Do (RH) you have any questions Officer CAMPBELL?

A. No, I think that is about it.

Q. When this statement is typed up, will you be willing to sign this?

A. Yes.

Q. Was this statement you have given here voluntary?

A. Yes.

Q. Are you under any stress or coercion? (RH)

A. I don't know what coercion is.

Q. Has anyone forced you to give this?

A. No.

Q. Are you under the influence of any drugs?

A. Not at this moment.

Q. Are you under the influence of any liquor or alcholic beverages?

A. Not at this moment.

Q. After this statement is typed, you will be given a copy in addition to the copies in which you indicated you would sign. Is that correct?

A. Yes.

The transcript supports the full compliance by the state with the objective standards of *Miranda.* Each and every indication of defendant's misunderstanding of this very explicit "Miranda" warning, as explained by the defendant himself (R. 286-289), arose *after* the appellant's confession.

Clearly, the invitation to self-serving confusion and exculpatory misunderstanding would prove irresistible if this occurrence were to allow defendants to nullify and rescind an otherwise sufficient confession merely by claiming a *subsequent* misunderstanding as to the meaning of the warning. The respondent is without knowledge of any subsequent Supreme Court decision treating the effect, if any, of a subsequent denial of a knowledgeable and voluntary confession which was entered after a "Miranda" warning where the accused acknowledged his understanding of its provisions.

Various state and lower federal courts have examined this issue and have found the *ex post facto* test of confusion by appellant to be unworkable and fraught with the probability of self-serving declarations of mistake. In *Foster* v. *State,* 304 N. E. 2d 534 (Ind. 1973), that court held that a defendant could not claim later, after having been given a full "Miranda" warning, that he did not understand his right to have counsel present, or that counsel would be appointed if he could not afford to retain one. This objective approach to *Miranda,* is not isolated, and was also adopted by the Court in *State* v.

McKnight, 52 N. J. 35, 243 A. 2d 240, 251 (1968), wherein the court concluded:

> "Hence if a defendant was given the Miranda warnings, if the coercion of custodial interrogation was thus dissipated, his 'waiver' was no less 'voluntary' and 'knowing' and 'intelligent' because *he misconceived* the inculpatory thrust of the facts he admitted, or because he *thought* that what he said could not be used because it was oral or because he had his fingers crossed, or because he could well have used a lawyer." (Emphasis added.)

In *Jones* v. *State*, 252 N. E. 2d 572, 577 (Ind. 1969), that court found that a full "Miranda" warning, which the defendant acknowledged as understandable at the time given, established a *prima facie* case that a confession entered pursuant to the warning was voluntarily and intelligently offered. The burden was then shifted to the defendant to prove his error of understanding or his incapacity to make a knowing waiver. See also *Frazier* v. *United States*, 476 F. 2d 891, 898 (D. C. Cir. 1971). An enlightening article in 52 N. C. L. Rev. 454, at 460 (Dec. 1973), reviewing the post *Miranda* cases concluded:

> "An accused can rarely expect to nullify or express waiver and confession simply by testifying that he misunderstood his rights. . ."

The article continues, at 462-463, that the police cannot be expected to employ a subjective standard to determine when a waiver and confession were "really" voluntary,

absent some overt and discernable sign which should elert them to the defendant's incapacity to understand his actions.

Respondent maintains there was no external showing of record which would indicate defendant's misunderstanding if in fact it did exist. The defendant's own words at trial confirm this finding (R. 291-293). This jurisdiction should embrace the majority and objective test and reject appellant's belated assertion of misunderstanding as to his waiver and confession.

Appellant's second argument relating to this aspect of the case is the assertion that he did not have the capacity to make a knowing waiver. This subject is treated in 69 A. L. R. 2d 348:

> "The law on the question under annotation is relatively clear and may be summarized as follows: mental subnormality on the paret of one confessing to a crime does not of itself deprive the confession of voluntariness or for its admission in evidence, so long as the subnormality has not deprived the person in question of the capacity to understand the meaning and effect of the confession."

This annotation is made applicable to post *Miranda* cases in 69 A. L. R. 2d, Later Case Service (Supp. 1974) at 142, which maintains the general rule that some objective showing of incapacity must be made by the aggrieved party for the waiver or confession to be held void. In *Coney* v. *State*, 491 S. W. 2d 501 (Mo. 1973),

the confession of a 16 year old, accused of murder, was admissible where, although he was illiterate and of subnormal mentality, he was found capable of distinguishing between right and wrong and able to understand the significance of his criminal act. See also *State* v. *Sisneros*, 79 N. W. 600, 446 P. 2d 875 (1968); *Encina* v. *State*, 471 S. W. 2d 384 (Tex. Crim. 1971.

Respondent maintains that appellant's assertion as to the burden of proof is fundamentally misplaced. A close reading of *State* v. *Lopez*, 22 Utah 2d 257, 451 P. 2d 772 (1969), indicates a prima facie case of voluntary waiver is established where defendant was apprised of his rights and then waived them. The present record does not establish sufficient evidence of defendant's incapacity, or of a confession entered under circumstances of duress or coercion to regard it as inadmissible. Appellant's statement that the defendant was subnormal is wholly conclusionary, (App. Br. P. 23), since Dr. Moench in testimony testified that the appellant was in the "normal" range (R. 465).

The record supports the conclusion that the defendant had sufficient capacity under the tests discussed, *supra*, to enter a voluntary waiver of the rights in question and enter his confession of guilt. Dr. Moench, the psychiatrist, called upon to examine the defendant prior to trial, testified that defendant could distinguish right from wrong and was aware of the nature of his actions (R. 459). Defendant testified, though maintaining he misunderstood his right to counsel and silence that

he was competent to understand the nature of the "Miranda" rights (R. 294). Further, the deputy county attorney, Mr. Shepard, who attempted to assist the defendant after the arrest, testified that the defendant was both lucid and capable of understanding the nature of his actions (R. 307-308). Appellant's assertion that the defendant was not capable of entering a voluntary or intelligent waiver of his rights must be dismissed as without support in the record.

Respondent would join with appellant in desiring an infallible subjective test by which to gauge the actual intent and understanding of an accused. This idealistic jurisprudence, unfortunately, is not within present vision; without malice, therefore, respondent must ask that appellant's attack upon his voluntary waiver of rights and confession be dismissed as without basis in law or fact. This conclusion is required by *State* v. *Allen*, 29 Utah 2d 88, 90, 505 P. 2d 302 (1973), where this court concluded:

> "This court will not disturb the finding of the trial court a confession was voluntarily made in the absence of a showing of an abuse of discretion, where there is substantial evidence upon which the trial court could reasonably so find."

POINT IV.

THE TRIAL COURT PROPERLY ALLOWED THE INTRODUCTION OF OBJECTS

TAKEN FROM APPELLANT'S DWELLING PLACE.

In allowing into evidence items taken from appellant's dwelling, the Lower Court premised its action upon one of two theories (R. 433):

> (1) The defendant did not have standing to object to the search since the residence was under the exclusive control of Mrs. Herron (the defendant's mother) where she had freely and without coercion or duress consented to the search;
>
> (2) The defendant had by silence and affirmative acts consented to the search.

The facts indicate Mrs. Herron had exclusive control of the dwelling with the defendant being at most a tenant at will in her household. With such a relationship, a vast majority of courts hold the doctrine of *Stoner* v. *California*, 376 U. S. 483, 84 S. Ct. 889, 11 L. E. 2d 856 (1964), as applicable.

The following excerpts of trial testimony indicate that the defendant was living with Mrs. Herron within a familial relationship and not as a boarder or tenant. This relationship is significant in establishing the exclusive right of Mrs. Herron to allow a search of the premises absent objection by the defendant. On this point, the record discloses:

(1) Mrs. Herron had received forty

dollars ($40) from her son. All but four dollars ($4) of this amount was for payment or an antecedent debt (R. 419).

(2) The defendant shared the room with other relations and did not exercise exclusive use. Further, there was no petition to define defendant's living area, nor did defendant have a key (R. 420).

In *State* v. *Schott*, 182 N. W. 2d 878, 880 (Minn. 1971), the Minnesota Supreme Court concluded a mother had exclusive dominion of a residence. A resultant right to permit a warrantless search of her son's room existed even when there was not a landlord tenant relationship between the mother and son established through the payment of consideration and where the exclusive use of a room or area was acknowledged. The decision, at 879 footnote (1), indicates the right of a parent to allow a search of the area in which a child resides to be the majority rule.

The Maryland Court in *Jones* v. *State*, 13 Md. App. 309, 283 A. 2d 184, 186 (1972), further supports the contention that a defendant's parent may consent to the search of a room or area used by the defendant when there was not a tenancy relationship. The cases in 31 A. L. R. 2d 1081-1083 also support the conclusion, in the instant case, that Mrs. Herron had the sale and exclusive right to grant or deny a search of her residence.

There remains for consideration the issue of consent by Mrs. Herron to the search. The transcript of trial

establishes that Mrs. Herron allowed the police to enter and search the premises only after they had requested to do so (R. 173-174). The record further discloses that she had acceded to the requests voluntarily, motivated by her desire to be ". . . a law-abiding citizen" and, with *clear knowledge* that she could *refuse* any such request for entrance, (R. 187). Against this factual setting, the assertion that Mrs. Herron was coerced or acted under duress in allowing the police to search her residence takes on an air of whimsical speculation.

Even absent the aforementioned facts, there is not affirmative duty, under the Fourth Amendment, to inform those having ownership or control of a premise of their right to deny such searches, or to elicit from them a *knowing* waiver to such searches. The Supreme Court has determined in *Schneckloth* v. *Bustamonte*, *supra*, that knowledge of a right to refuse entry is not a prerequisite of voluntary consent.

As to the second argument discussed by the trial court, respondent does not believe the defendant, within the facts of this case, possessed an independent right of refusal to deny the search of his mother's residence. The record, however, indicates defendant not only did not object, but tendered a voluntary acquiescence to the search by becoming an active participant (R. 272).

The instant case appears to parallel this court's holding in *State* v. *Lopez*, *supra*, where a voluntary admission, leading to a search, which was not objected to,

was held to constitute a binding consent to the search under the Fourth Amendment requirements.

Again, it is not a constitutional requirement under the *Schneckloth* decision, *supra*, to look beyond apparent facts to determine if defendant knew or was fully appraised of his rights before a search of the residence could be allowed.

POINT V.

THE EVIDENCE DOES SUPPORT THE TRIAL COURT'S FINDING THAT THE APPELLANT FULFILLED ALL REQUISITES OF MURDER IN THE SECOND DEGREE.

Utah Code Ann. § 76-30-2 attempts to define "malice" as follows:

> "Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take the life of a fellow creature. It is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."

Here attempts are made to distinguish some levels of intent and/or action so as to postulate the exact crime committed. Respondent feels that appellant's brief is full of innuendos supporting the position that without actual defined pre thought-out intent, the requirement

of malice is not fulfilled and no finding of murder can be made. This court has not given such a broad and sweeping interpretation to the law of this state.

It is presented by the respondent, that even the diminished capacity of the appellant does not do away with the fulfillment of the malice requirement when taken into account with the entire record. This court has emphasized that to be guilty of second degree murder does not require an explicit intent to kill. In *State* v. *Matteri,* 119 Utah 143, 225 P. 2d 325 (1950), this court upheld the first degree murder conviction of the appellant even though the trial court had failed to instruct the jury on the possibility of second degree murder when there existed an intent to kill. The court said:

> "Eliminated from the case entirely, so far as second degree murder is concerned, is the possibility of second degree murder where there exists an intent to kill. *While intent to kill is not a necessary requisite to second degree murder, it may be an important element if there is absent other elements to raise the killing to first degree murder."* (Emphasis added.)

Though the court continued by discussing the aspects of intent, malice aforethought and premeditation, the court did squarely indicate that sufficient evidence could exist without proving "intent to kill" which would be sufficient for a finding of murder in the second degree.

Appellant's statement that the defendant acted solely out of fear (Appellant's brief, P. 28) is conclusionary in

the sense that though Dr. Moench testified that it was his opinion that such was the case, the defendant also knew that it was not right to strike or make an injured child walk (R. 458) and defendant knew that striking an injured child could kill that child (R. 459). Dr. Moench's entire testimony is filled with such conflicts such as: The appellant knew what was right and wrong but didn't have intent to hurt; or the defendant was not insane at the time of the incident but couldn't control his acts. It is therefore up to the trier of fact to determine from all evidence whether the defendant knew that hitting the child would cause injury. If so, then sufficient intent and malice does exist to warrant the court's finding of murder in the second degree.

It is not prejudicial for the court to find the state not upholding its burden of proof regarding the premeditated first degree murder, but to find murder in the second degree. The appellant contends such error and cites *State* v. *Russell,* 106 Utah 116, 145 P. 2d 1003 (1944), in support thereof. *Russell,* as well as *State* v. *Thompson,* 110 Utah 113, 170 P. 2d 153 (1946), merely stand for the proposition that intent to kill *may be,* but is not required to be, an element of second degree murder. In *Russell,* the prejudicial error resulted from the trial court's instruction that the defendant had to have the specific intent to kill in order to commit second degree murder (106 Utah at 131-2). Thus, *Russell* is clearly distinguishable from the instant case. In *Thompson,* the prejudicial error resulted from the trial court's failure to instruct

the jury that a necessary element of first degree murder, on the theory of a killing perpetrated by an act greatly dangerous to others' lives evidencing a depraved mind regardless of human life, was a planned and intentional shooting (110 Utah at 129, 170 at 161). Thus, *Thompson*, too, is entirely different from the instant case.

The appellant relies heavily on the testimony of Dr. Moench. Many of his statements as indicated above are not totally in harmony with the innocence of the appellant for reasons of diminished capacity. Dr. Moench did testify that an intense emotional buildup took place within the defendant before the day in question as a result of an argument with the defendant's stepfather (R. 454). "The defendant reported that he was extremely angry at this time, was almost ready to kill the stepfather" (R. 454).

It cannot be substantially disproved from the record that the defendant did not know his actions could lead to harm and possibly murder if a release was found for this buildup.

The court found that even with this impulse to gratify his anxieties, sufficient capacity existed on the part of the defendant to realize the effects of what was taking place. Simply because there was no direct proof that the appellant "lied in wait" or meticulously planned the murder of the victim does not show that murder did not take place in compliance with the definition of the Code. In fact, the court did so find that the pre-meditation required for first degree murder was not proven,

but that sufficient evidence existed to make reasonable men conclude that even with diminished capacity, the defendant knew or should have known that serious bodily injury would happen if the young child was hit.

Though the appellant places great emphasis on *State* v. *Trujillo*, 117 Utah 251, 214 P. 2d 626 (1950), the respondent indicates that that holding was modified by *Matteri, supra*, in that specific beforehand intent to kill is not a necessity for the conviction of murder in the second degree. The respondent therefore submits that there was sufficient evidence to prove that the appellant was guilty of murder in the second degree.

POINT VI.

THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY THE EVIDENCE AT TRIAL.

Appellant attempts to create a "void" of evidence relating to the Findings of Fact and Conclusions of Law. Such contentions in themselves have no merit when the entire record is viewed and total testimony of all concerned is studied. Thus, the respondent submits the following in support of its position that the Findings of Fact and Conclusions of Law are supported by sufficient evidence.

Finding of Fact number three relating to the intent to cause bodily harm or that the defendant should have known that such would take place, was testified to ex-

tensively by Dr. Moench. Not only did Dr. Moench state his opinion (which can or cannot be considered "the right answer" by the trier of fact) that the actions of the defendant were impulsive, but he also stated that the appellant was emotionally keyed up from a previous day, that "there was nothing in my examination that indicated there was any intent to harm the child *until after the event got underway*" (R. 455), (Emphasis added) that the child's acts made the defendant lash out, and that the defendant knew right and wrong and knew the consequences of his acts (R. 458). The defendant was legally and medically sane at the time of the incident and he knew that striking an injured child could kill that child (R. 459). The opinion of Dr. Moench further contained the statement that the defendant knew hitting in the stomach injures (R. 467).

Certainly, these statements by Dr. Moench which also support the finding of diminished capacity show that the defendant did have faculties available for which the judge could find malice. Not only these statements, but the confession of the defendant himself (State's exhibit 20) indicates clearly that he should have known injuries existed after having hit the victim. When the appellant saw a bump on the head of the victim he said: "I really got worried then" (State's exhibit 20, p. 6), realizing that something serious was wrong, yet he continued to hit the victim. It was not erroneous for the court to find as fact that the defendant knew or should have known the consequences of his acts.

From the testimony deduced above and that which relates to the points in issue, Conclusions of Law two and three are supported by findings of fact. Appellant makes it appear that without certain desires or intents to kill, malice aforethought cannot be established. Respondent contends that this might be true of only one or two blows were struck, but not only did it cease to stop with that, but belts, spray bottles, and sheer force were used in a most atrocious way to cause harm. Evidence indeed supports the finding that the appellant should have known the consequences of his acts. Therefore, it is a logical conclusion based on those findings that malice did in fact exist in support of the court's finding of murder in the second degree. No inconsistency appears and certainly the trier of fact did not usurp any unwarranted authority to make the findings and conclusions it did.

In the closing language of the Tenth Circuit in *Williams* v. *United States*, 267 F. 2d 559 (10th Cir. 1959), cited by the appellant the court said:

> "In other words, the court in effect found the issues of fact against appellant; and the crucial findings have adequate support in the record and are not clearly erroneous. Therefore, they must not be disturbed on appeal."

Though this case is clearly distinguishable on facts alone, the application of the above language says that unless the findings are "clearly erroneous" they will not be disturbed on appeal.

The respondent has reviewed the entire transcript and record with particularity and finds "no clearly erroneous" findings in the entire matter. Respondent therefore prays this Court to so find and deny any request for acquittal or new trial.

POINT VII.

THE TRIAL IN THIS ACTION WAS COMPLETE AND WITHOUT ERROR EVEN THOUGH FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE ENTERED BY A JUDGE OTHER THAN HE WHO HEARD THE EVIDENCE.

Appellant's final argument on appeal is a bootstrapping attempt to get this court to act in opposition to the fair processes of trial. This argument is therefore nonmeritous and should be rejected as having no substantial basis for either acquittal or reversal.

Rule 52 of the Utah Rules of Civil Procedure says in part:

> "In all actions tried upon the facts without a jury or with an advisory jury, *the court shall find the facts specially and state separately its conclusions of law thereon,* and judgment shall be entered pursuant to Rule 58A." (Emphasis added.)

The language emphasized above does not require that said findings of fact or conclusions of law be in writing

or of a formal nature — only that they be made in some form of clarity. The judgment is required to be entered. The respondent submits that this test or requirement was met at the close of trial when Judge Wilkins found the appellant guilty of murder in the second degree. The court said:

> "THE COURT: . . .The parties having rested and submitted final argument, this is my ruling: I find that the defendant, Stewart Michael Kelsey, is guilty of the crime of murder in the second degree. The testimony of two of Utah's most distinguished medical doctors, one a psychiatrist, and one a forensic pathologist, coupled with other corroborating testimony, demonstrated that the defendant had a diminished ability to control himself in the commission of this crime, and, therefore, the elements of murder in the first degree beyond those requisite for murder in the second degree were not proved by the state beyond a reasonable doubt. I do find, however, that the state has proved each and every element of the crime of murder in the second degree beyond a reasonable doubt." (R. 526-527).

Contained herein is each and every fact and conclusion of law upon which the formal findings were made. From the fact that the appellant had a diminished capacity to control his impulses to the rejections of premeditation necessary for first degree murder, the court made certain that all understood that the appellant Stewart Michael Kelsey had done everything required to be convicted of

murder in the second degree. This, of course, includes the fact that he was the one causing injury, he did so knowing the consequence of his acts, and that said beating was intentionally done with malice aforethought.

This court has not resolved all conflicts or possible situations which could arise under Rule 52 and Rule 63 and as such it seems consistent with justice and fairness to interpret the language of said rule to include this "spirit" of the law, and not rely solely on the formal requite of written and signed findings.

As far as appellant trying to bootstrap it must be noted that a final judgment and sentence were pronounced and signed by Judge Wilkins on whether formal findings of fact and conclusions of law should be made and entered. Three months passed from the time the court found defendant guilty of murder in the second degree (R. 527) until said motion was made (R. 532).

Thus, the request for formal findings of fact and conclusions of law did not go to the guilt or innocence of the defendant, but solely for written findings to allow preparation for appeal or other noncontrolling reasons.

The appellant cites *Makah Indian Tribe* v. *Moore*, 93 F. Supp. 105 (D. C. Wash., 1950), in support of his argument that findings of fact and conclusions of law should not be signed by a subsequent judge. The case at bar is distinguishable and the facts presented add different insight into the case than what appellant asserts.

Makah involved the interpretation of F. R. C. P. 63 which is essentially the same as Utah's present Rule 63. Therein a judge who heard the case died before either the findings were made or judgment signed. This judge did, however, give oral findings and conclusions although they were not so labelled or separable. The court said, however:

> "From the foregoing it is apparent that the opinion of Judge Black is sufficient to stand for formal findings of fact and conclusions of law if it indicates "the factual basis for the ultimate conclusion" and if it "provides a clear understanding of the basis of the decision."

The court found that because sufficient reason was given for the findings made, a subsequent judge according to Rule 63 had the power to sign the judgment. The court added a matter of dictum by saying:

> "It is unnecessary that I also sign the submitted findings and conclusions. In fact it would be improper for me to do so as Judge Black was the one who heard the evidence and saw the witnesses and the exhibits. It was his decision."

Thus, this case did not stand solely for what the appellant purports, but for the fact that what was said from the bench was sufficient to allow a subsequent judge to sign the judgment.

In the case at bar the judgment was signed and the defendant ordered to prison. The mere signing of findings of fact and conclusions of law is not paramount and in no way affects the guilt or innocence of the appellant and is not prejudicial to his position.

If the court so finds that this was error, it certainly would be classified as harmless error. Rule 61 of the Utah Rules of Civil Procedure provides as follows:

> "No error in either the admission or the exclusion of evidence, and *no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial* or otherwise disturbing a judgment or order, *unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the sustantial rights of the parties.*" (Emphasis added.)

Certainly, the appellant has failed to show or even attempt to show why or how the failure of signing the findings of fact and conclusions of law is prejudicial of his substantial rights. Appeal was not made until after said findings were entered, well over a year after the conclusion of trial. This is indeed much more than the allotted thirty days for appeal. This can't be prejudicial against the defendant, it was in his favor.

The respondent therefore submits that Rule 52 and

63 of the Utah Rules of Civil Procedure be construed liberally to include those circumstances not yet known. The appellant requests a strict and narrow interpretation of the Rules. Simply because Rule 63 states that another judge may perform court duties "after a verdict is returned or findings of fact and conclusions of law are filed . . ." does not and should not mean that after judgment has been signed and entered, another judge cannot make such findings when in itself the motion for formal findings was signed. No prejudice took place, and if this court considers this omission error, such error was harmless. The Court should therefore reject this contention of the appellant.

CONCLUSION

Based on the foregoing analysis of the case at bar and based on the discussion presented in respondent's arguments above, the respondent submits to this Court that the trial court was correct in its finding of guilt, the appellant had the right to waive the jury, and that no grounds exist which warrant a reversal or granting of a new trial.

Respectfully submitted,

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